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No. 96-1743

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHNSON & HIGGINS, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether directors of a corporation who continue to perform their duties as employees of the corporation are employees within the meaning of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*

2. Whether a retirement policy that requires certain employees to retire at a specified age can be defended under Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1), as a policy "based on reasonable factors other than age."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 91 F.3d 1529. The opinion of the district court (Pet. App. 36a-50a) is reported at 887 F. Supp. 682.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1996. A petition for rehearing was denied on January 31, 1997. Pet. App. 35a. The petition for a writ of certiorari was filed on May 1, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner is an international insurance brokerage and employee benefits consulting firm, with more than 100 offices and 8,000 employees world-wide. Pet. 5. Petitioner's charter and bylaws provided that its affairs would be managed by its board of directors which consisted of between 20 and 44 members. Pet. App. 37a.[1] The directors were elected by the board from among petitioner's high-level employees who were actively engaged in employment at the time of election, such as officers of petitioner or of one or more of petitioner's subsidiaries. *Id.* at 3a, 37a-38a.

When employees became directors, they "retain[ed] their prior duties" and "remain[ed] 'employees' of the corporation." Pet. App. 38a. Petitioner stated that its understanding was that a director would "*continue in [petitioner's] active service as an officer and employee of [petitioner] or one of [its] subsidiaries.*" *Id.* at 3a (quoting letter from petitioner to respondent).

Petitioner's employees were required to purchase shares of stock (at a relatively nominal cost) before being able to serve as directors. Pet. App. 37a-38a. Once they became directors, the employees were required to maintain ownership of that stock during their directorship. *Ibid.* As a practical matter, direc-

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[1] The statement is couched in the past tense to describe the facts as of the date of the district court ruling. Those facts, however, may no longer exist. Petitioner has informed the Court that, in March 1997, all of petitioner's stock was purchased by Marsh & McLennan Companies, Inc., and petitioner became a wholly owned subsidiary of that entity. Pet. ii, 5. Petitioner is no longer owned and managed by the members of its board of directors (Pet. 5) and the mandatory retirement policy is no longer in operation (Pet. 8 n.3).

tors were not responsible, however, for contributing any capital to the company, other than the nominal cost of their stock. They were not liable for the debts of the corporation. *Id.* at 4a-5a.

After an employee became a director, his compensation was determined on an annual basis by a board committee, as a certain percentage of the corporation's profits, but was based primarily on individual performance reviews. Pet. App. 4a. Petitioner withheld state and federal taxes from the compensation checks paid to its employee-directors. See C.A. App. 15, 405. Employee-directors were also considered employees for purposes of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, and they participated in numerous other employee-benefit plans. C.A. App. 14, 404, 555; see also *id.* at 341-343.

An outgoing employee-director was required to promise that he would not compete with petitioner and that he would remain available as a consultant for a specified period of years, and he was required to surrender his stock pursuant to a purchase contract. Pet. App. 5a, 37a. Once an individual retired as a director, he also lost his position as an employee of the corporation, as well his position as a stockholder and officer. *Id.* at 39a.[2]

b. In 1983, petitioner, through its board of directors, adopted a mandatory retirement policy that provided:

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[2] Employees joining the board as directors were asked to submit a letter of resignation "as a Director, officer and employee." Pet. App. 39a. That letter became effective at such time as two-thirds of the board so voted. *Ibid.*

> the normal retirement date for Directors [shall] be the earlier of (a) the end of the year in which the age 62 is attained or (b) the end of the year in which age 60 is attained and 15 years of service on the Board is completed. With respect to (b), in cases of corporate need determined by the Chairman and approved by the Executive Committee, a Director may continue on a year-to-year basis up to but not beyond the end of the year in which age 62 is attained.

Pet. App. 5a. Petitioner stated that the retirement policy was adopted to allow the directors "to plan their own compensation and succession in an orderly fashion." *Id.* at 22a. Petitioner considered the policy necessary "to permit more orderly planning for succession and transfer of responsibility and also to make stock allocation fairer and more predictable." Pet. 9.

2. Respondent, the Equal Employment Opportunity Commission (EEOC), brought this action against petitioner alleging that petitioner's mandatory retirement policy discriminated against employees because of their age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* Pet. App. 37a. Respondent sought injunctive relief, as well as reinstatement, back pay and prejudgment interest. *Id.* at 7a.[3]

The district court granted the EEOC's motion for summary judgment on liability, and entered an order that, *inter alia*, permanently enjoined petitioner from

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[3] The EEOC became aware of petitioner's mandatory retirement policy when a director filed a charge of age discrimination because he had been forced to resign for reasons unrelated to the policy. Pet. App. 5a.

applying its mandatory retirement policy and directed that the policy be rescinded. Pet. App. 51a-53a.[4] The district court held that petitioner's policy "violates the clear language of the ADEA" (*id.* at 40a) because it "not only forces a Director to give up a directorship at age 60 or 62, but it also terminates one's status as officer and employee of the corporation." *Id.* at 41a.

The court rejected petitioner's argument that its mandatory retirement policy was based on "reasonable factors other than age" and therefore was permissible under Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1). The court explained that, "to qualify for [that] defense under the Act, an employment practice or policy must be 'age neutral.'" Pet. App. 41a (quoting in part *Iervolino* v. *Delta Air Lines, Inc.*, 796 F.2d 1408, 1415 (11th Cir. 1986), cert. denied, 479 U.S. 1090 (1987)). The court agreed with respondent's regulation that states, "[w]hen an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable." *Ibid.* (quoting 29 C.F.R. 1625.7(c)). The court pointed out that petitioner's policy uses age as its sole limiting criterion thereby precluding petitioner's reliance on that defense. *Id.* at 41a-42a.

The court also rejected petitioner's contention that the court should view the mandatory termination of employee status under the retirement policy as limited to the peculiar "dual status" of petitioner's employee-directors, rather than due to age. Pet. App. 42a. Relying on *Johnson* v. *New York*, 49 F.3d 75 (2d Cir. 1995), which involved similar "dual status" em-

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[4] The court directed the parties to engage in discovery with respect to money damages. See Pet. App. 52a-53a.

ployees (civilian security guards required to be National Guard members), the court found that petitioner was precluded from arguing that its employee-directors were "forced to give up their employee status because of factors other than age." Pet App. 43a.[5]

In addition, the court rejected petitioner's argument that its employee-directors "are not really 'employees' within the meaning of the [ADEA]" and should be viewed, instead, as members of a partnership who are employers rather than employees under the ADEA according to *Hyland* v. *New Haven Radiology Associates, P.C.*, 794 F.2d 793, 798 (2d Cir. 1986). Pet. App. 44a (but also citing case "rejecting a per se rule that partners are not employees and instead setting forth a multi-factor test," *e.g.*, *Caruso* v. *Peat, Marwick, Mitchell & Co.*, 664 F. Supp. 144, 148-150 (S.D.N.Y. 1987)).[6] The district court noted that petitioner's de facto partner argument had some merit because employees who are also co-owners and directors of a corporation may be in a better position

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[5] The court expressly noted that petitioner's justification for its "dual status" requirement was considerably less persuasive than the arguments rejected in *Johnson* because petitioner could restructure its retirement plan for directors so that it took effect at age 65, rather than age 60 or 62, since the ADEA permits forced retirement of high-level employees at that age. Pet. App. 44a (citing 29 U.S.C. 631(c)); see also *id.* at 6a n.2, 46a.

[6] The ADEA provides that it is unlawful for employers to engage in employment discrimination on the basis of age (see 29 U.S.C. 623(a)), and defines "employer" simply as a person engaged in an industry affecting commerce who has a certain number of employees, see 29 U.S.C. 630(b). It defines "employee" generally as "an individual employed by any employer." 29 U.S.C. 630(f).

to protect their own interests than are regular employees. *Id.* at 45a. The court concluded, however, that the argument was foreclosed by *Hyland* which held that a professional corporation cannot be treated as a partnership for purposes of the ADEA. Pet. App. 45a-46a. The *Hyland* court reasoned that an officer and director of a corporation may or may not be an employee, depending on the circumstances of the case. The district court declined petitioner's invitation to create a judicial exception to ADEA coverage for "corporate employees who are also Directors and share-holders of their corporation," because Congress had declined to do so legislatively. *Id.* at 46a.[7]

3. Petitioner pursued an interlocutory appeal of the district court order entering the injunction and the court of appeals affirmed. Pet. App. 1a-34a.

a. In an opinion for the majority of the panel, Judge Cabranes explained that the court agreed that *Hyland* precluded petitioner's argument that its employee-directors are not protected by the ADEA because they are, in essence, members of a partnership. Pet. App. 16a-17a. At the same time, however, the court of appeals noted that the directors of a corporate enterprise may or may not otherwise be employees. *Id.* at 17a. Finding the statutory text of the ADEA to be of little help in making that

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[7] The court also rejected petitioner's challenge to respondent's statutory authority to bring the suit and related arguments. See Pet. App. 46a-48a & n.8. It expressly disagreed with petitioner's contention that the suit should have been dismissed because of respondent's failure to attempt conciliation, finding that respondent had made such attempts and emphasizing that petitioner "has maintained at all times an intransigent position regarding its mandatory retirement policy." *Id.* at 49a; see also *id.* at 48a-50a.

determination, the court reviewed the relevant decisional law. It noted that several courts of appeals have held that, "although corporate directors are traditionally viewed as employers, they may also be considered employees depending upon their position and responsibilities." *Ibid.*; see also *id.* at 18a. And it pointed out that an employment relationship can coexist with a proprietary interest. *Ibid.* (citing *Hyland*, 794 F.2d at 798 and quoting *Goldberg* v. *Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961)).

To determine whether an individual is an employee, the courts have focused on whether an employer-employee relationship exists, the common law principles of employment, and performance of traditional employee duties. Pet. App. 17a-18a (citing, *e.g.*, *Chavero* v. *Local 241, Div. of Amalgamated Transit Union*, 787 F.2d 1154, 1157 (7th Cir. 1986); *EEOC* v. *First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068, 1070 (6th Cir. 1982), cert. denied, 464 U.S. 819 (1983)). Some courts have molded the common law agency analysis into a three-factor test that turns on whether the director (1) undertakes "traditional employee duties"; (2) was "regularly employed by a separate entity"; and (3) "reported to someone higher in the hierarchy." *Id.* at 18a; see also *id.* at 19a (citing cases).

The court concluded that, because all three factors were established in this case, petitioner's directors were "employees" for purposes of the ADEA. Pet. App. 19a-20a & n.14. The court recognized that the employee-directors' compensation consisted of a percentage of annual profits (a factor suggesting no traditional employment relationship), but emphasized that compensation was also tied to the employee-directors' performance evaluations conducted by senior board members and reasoned that such authorita-

tive evaluations by their superiors suggested that they were employees under the common law test. *Id.* at 20a. Finally, the court found "[m]ost telling" petitioner's "own admission that, upon election, a * * * director '*will continue in [petitioner's] active service as an officer and employee of [petitioner] or one of its subsidiaries.*'" *Ibid.*

Thus, the court concluded that the ADEA was applicable insofar as the mandatory retirement policy requires petitioner's directors to retire as employees of the corporation before the statutory minimum age of 65. Pet. App. 20a-21a (citing 29 U.S.C. 631(c)). It agreed with the district court that petitioner could comply with the ADEA through a variety of means, including by "severing the link between" an individual's director status and his or her employee status. *Id.* at 21a.

b. The court rejected petitioner's argument that its policy is based on a "reasonable factor other than age" and therefore valid under 29 U.S.C. 623(f)(1). Pet. App. 21a-22a. It observed that "[t]he plain language of § 623(f)(1) makes it clear that an employer has a defense if his policy is based on reasonable factors 'other than age,' *not* if the policy is reasonably based on age." *Id.* at 22a. The court concluded that the ADEA thus provides an exception for age-neutral decisions that might be correlated with age, such as health or education, but "not an exception for policies that *explicitly but reasonably* discriminate based on age." *Ibid.*; see also *id.* at 22a-23a (discussing First and Third Circuit cases that adopted same view).[8]

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[8] Like the district court, the court of appeals rejected petitioner's conciliation argument (Pet. App. 9a-11a) and its challenge to respondent's statutory authority to bring the

The court of appeals remarked (Pet. App. 23a) that petitioner's argument was similar to one rejected by this Court in a suit under analogous sex discrimination statutes. In that case, *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), the Court rejected the employer's argument that its pension policy that required larger contributions by women was based on the longer life expectancy of women, not their sex. The Court ruled that the pension policy was impermissibly based on sex because that was the only factor taken into account. The court of appeals viewed petitioner's retirement policy to be no different because age is the only factor it takes into account. Pet. App. 23a-24a. The court therefore found petitioner's motivations underlying the policy to be "irrelevant." *Id.* at 23a.[9]

ARGUMENT

1. Petitioner contends (Pet. 17-23) that its directors are not "employees" within the meaning of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C 621 *et seq.* It asserts that the court of appeals' ruling is contrary to this Court's decisions

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action (*id.* at 11a-14a). The court of appeals also found no merit in petitioner's challenge to the scope of the injunctive relief. *Id.* at 24a-25a. Petitioner does not present any of those issues for review by this Court. See Pet. i.

[9] In a dissenting opinion, Judge Jacobs opined that, in their capacity as directors, the directors were employers rather than employees because of their economic relationship to the corporation. Pet. App. 27a-34a. He concluded that petitioner had demonstrated that a material fact remained in dispute as to whether petitioner's mandatory retirement policy affects the directors as employers or as employees, and that summary judgment was therefore inappropriate. *Id.* at 34a.

interpreting the term "employee" and conflicts with decisions of other courts of appeals.

a. The court of appeals' decision is fully consistent with this Court's precedents. In a recent decision not cited by petitioner, the Court affirmed that "the ultimate touchstone" for determining whether an individual is an employee under the analogous employment discrimination prohibitions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, is whether the individual has an "employment relationship" with the employer. *Walters* v. *Metropolitan Educ. Enter., Inc.*, 117 S. Ct. 660, 666 (1997). The Court also reaffirmed that whether such a relationship exists is determined by applying "traditional principles of agency law." *Ibid.* (citing *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 323-324 (1992)); see also *NLRB* v. *Town & Country Elec., Inc.*, 116 S. Ct. 450, 455 (1995). Contrary to petitioner's suggestion (Pet. 19), the three factors on which the court below focused did not substantively alter the application of those principles in this case. The court of appeals recognized that the common law agency test requires an examination of the "totality of the circumstances." Pet. App. 15a-21a. And its analysis was not, in fact, limited to only three factors. The court expressly discussed the fact that the directors' compensation was a percentage of annual profits, suggesting that a traditional employment relationship did not exist, but found that the compensation also was tied to performance evaluations, suggesting that the directors were employees under the common law test. *Id.* at 20a. And the court also relied upon the additional factor of petitioner's admission of the directors' continued employment services as weighing in favor of the existence of such a relationship. *Ibid.*

Petitioner's real disagreement appears to be with the court of appeals' recognition that an individual may have an employment relationship with a company that makes him an employee within the meaning of the ADEA, while he also serves as a director of the company. See Pet. App. 18a, 20a (citing dual status as employees and directors). Petitioner suggests (Pet. 18-19) that, by definition, any individual who owns or manages a corporation cannot also be an employee of that corporation.

Petitioner's proposed rule, however, cannot be reconciled with the precedents it cites. For example, in *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 30, 32 (1961) (cited at Pet.17), this Court held that members of a cooperative were employees within the meaning of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, notwithstanding the fact that cooperative members each shared in the cooperative, had voting rights, and were entitled to dividends on their share. The Court explicitly declared that there is "nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship," adding that "[i]f members of a trade union bought stock in their corporate employer, they would not cease to be employees within the conception of [the FLSA]." 366 U.S. at 32. In the Court's view, the individual would continue to be an employee, as well as a part owner of the company or member in the cooperative, so long as he or she continued to work for the company in an employment capacity. *Ibid.*; see also *Nationwide Mut. Ins. Co.*, 503 U.S. at 323-324 (cited at Pet. 17; discussing factors relevant to whether individual is employee, but not discussing whether individual is stockholder or manager). So too here, where the director continues

his employment relationship throughout the course of his service as a director the person remains an employee within the meaning of the ADEA.[10]

b. Petitioner errs in contending (Pet. 20-23) that the decision of the court of appeals conflicts with the decisions in *EEOC* v. *Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984); *Fountain* v. *Metcalf, Zima & Co.*, 925 F.2d 1398 (11th Cir. 1991); and *Devine* v. *Stone, Leyton & Gershman*, 100 F.3d 78 (8th Cir. 1996), cert. denied, 117 S. Ct. 1694 (1997)).

The cases cited by petitioner involved members of professional corporations who differed in relevant respects from the members of petitioner's corporate board of directors who continued to function as employees after joining the board. The relationships among the members of the professional corporations were functionally similar to the relationship among members of a partnership. For example, the shareholders in the professional corporations were limited to professionals such as lawyers and accountants, who were subject to state licensing or regulation. See *Dowd & Dowd*, 736 F.2d at 1179 (explaining that, under Illinois law, professional corporations operate much like partnerships and state law permits only licensed professionals to hold shares in professional corporations); *Fountain*, 925 F.2d at 1399 (professional corporation allows professionals to engage in

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[10] Petitioner's proffered rule would make little sense in the circumstances of many large corporations. In companies that have hundreds of officers and managers, many (or all) of those employees may own stock. If coverage were based solely on stock ownership, such an employee would lose the protection of federal law merely by buying some stock (and presumably regain it by selling)—a result clearly at odds with the rationale of this Court's decision in *Goldberg*.

their practices as partners do, with certain tax and liability benefits); *Devine*, 100 F.3d at 79 (law partnership was transformed into professional corporation). The professional corporation shareholders remained liable for some or all firm debts and were not immune from malpractice liability. See *Dowd & Dowd*, 736 F.2d at 1178-1179 (shareholders in professional corporation were not immune from malpractice liability and they managed, controlled and owned the entity in same manner as partners would; state regulation of partnerships and professional corporations overlapped); *[illegible]untain*, 925 F.2d at 1399, 1401 (shareholders were called partners and were jointly and severally liable for certain debts, obligations and liabilities of the corporation); *Devine*, 100 F.3d at 81-82 (professional corporation members remained responsible for firm debts). See also *Dowd & Dowd*, 736 F.2d at 1178 ("[t]he role of a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation").

By contrast, petitioner's employee-directors were officers and managers working throughout petitioner's more than 100 offices, as part of petitioner's workforce of more than 8,000 employees worldwide, and did not share a common profession. After becoming a director, each individual continued to perform employment duties along with additional duties. Further, petitioner treated all of them as employees for purposes of benefits, taxes and other federal laws. Unlike the professional corporation cases cited by petitioner, there is no evidence that petitioner's employee-directors were similar to partners regarding responsibility for capitalizing the company or liability for company debts. The result in this case

would not change under the reasoning applied by those courts of appeals.

The analysis employed by the court of appeals in the instant case differed somewhat from that of the cases cited by petitioner because the court below relied (Pet. App. 15a) on its earlier ruling in *Hyland* v. *New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2d Cir. 1986), a case involving a professional corporation that took an approach rejected by the *Fountain* and *Devine* courts. In *Hyland*, the Second Circuit held that, because the entity had chosen to assume the structure of a professional corporation rather than operate as a partnership, its shareholders could not be considered members of a partnership for purposes of the ADEA. Pet. App. 15a. The cases cited by petitioner reject the view that the corporate structure of an entity is dispositive of the question whether its shareholders can be treated as partners for purposes of the ADEA, and apply instead a case-by-case approach that examines whether a shareholder functions like a partner or whether the shareholder has an employment relationship with the corporation. See, *e.g.*, *Devine*, 100 F.3d at 80-81.

Significantly, however, the *Hyland* court's approach led to the same type of analysis in this case. In *Hyland*, resolution of the question whether the corporation could be treated as a partnership for purposes of the ADEA did not resolve the question whether the members of the professional corporation were employees. The members of the corporation may or may not have been employees under the ADEA, depending on their particular circumstances. 794 F.2d at 798. The court emphasized that there is no necessary inconsistency between a person's having a proprietary interest in a corporation and

also having an employment relationship with the corporation. *Ibid.* Similarly, the court below explained that "[w]hile *Hyland* prevents [petitioner] from claiming that its directors are 'partners,' that case does not preclude the argument that [petitioner] should be exempt from the ADEA on account of their position as *directors*." Pet. App. 17a. The court's ensuing analysis addressed essentially the same question as the cases cited by petitioner, *i.e.* whether petitioner's directors had an employment relationship with the corporation that rendered them employees within the meaning of the ADEA. Thus, although the courts have framed the ADEA coverage question somewhat differently, they agree that plaintiffs must demonstrate that a shareholder or director of a corporation is within the common-law definition of an employee for purposes of ADEA coverage, and to do so, plaintiffs are required to address substantially the same issues under the various approaches.

2. Petitioner also contends (Pet. 23-28) that its mandatory retirement policy is lawful because it falls within the exception for policies based on "reasonable factors other than age" in Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1).

a. The courts below correctly rejected petitioner's proposed reading of the "reasonable factor other than age" defense as contrary to the plain language of the ADEA. Section 4(f)(1) of the ADEA permits an employer "to take any action otherwise prohibited [by the statute] * * * where the differentiation is based on reasonable factors other than age." 29 U.S.C. 623(f)(1). An ordinary reading of that provision would permit an employer to rely on a factor other than age if that factor is reasonable. The text of the provision does not support the reading urged by petitioner (Pet.

23-25) that an employer is permitted to adopt a policy that uses age as the determining factor so long as the age-based policy is not arbitrary. A policy that uses age as the sole criterion in differentiating employees for purposes of employment decisions is plainly the opposite of a policy based on a factor other than age.

Petitioner's reading of the "reasonable factor other than age" provision is contrary to the central purposes of the ADEA. It would permit an employer, for example, to fire or refuse to hire older workers merely because the employer believed that older people should devote themselves to good deeds or because it wanted to make room for younger workers. Petitioner's reading is also inconsistent with the EEOC's interpretation that Section 4(f)(1) applies only to age-neutral factors, which was cited favorably below. See Pet. App. 21a-22a (citing 29 C.F.R. 1625.7(c) ("When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.")).[11] Cf. *Phillips* v. *Martin Marietta*

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[11] Petitioner errs when it suggests (Pet. 26-27 & n.8) that the Secretary of Labor once interpreted the "reasonable factor other than age" exception defense to apply to age-based practices. When the regulation cited by petitioner is read in context, the full regulations demonstrate that the Secretary of Labor, like the EEOC and the courts of appeals, understood the provision to apply only to practices which were age-neutral. Specifically, following the passages quoted by petitioner, the regulation offers examples of possible "reasonable factors other than age" and those examples are all age-neutral: physical fitness requirements, physical examinations, production standards and minimum educational levels applied uniformly to all employees regardless of age, and cost. 29 C.F.R. 860.103 (1969) (adding that purpose of defense is "to insure that age * * * is not a determining factor in making any decision

Corp., 400 U.S. 542 (1971) (employer's policy of hiring men, but not women, with preschool-age children constitutes sex discrimination under Title VII).

Petitioner's proposed interpretation would render another provision of the ADEA surplusage. In the same Section that contains the "reasonable factor other than age" defense, Congress provided a defense for practices explicitly based on age—the "bona fide occupational qualification" (BFOQ) defense. 29 U.S.C. 623(f)(1). That defense allows employers to "take any action otherwise prohibited * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1). This Court has held that the BFOQ defense requires more than a showing that the employer's reliance on age is "reasonable" under the circumstances. *Western Air Lines* v. *Criswell*, 472 U.S. 400, 414 & n.19 (1985). To read the "reasonable factor other than age" defense as an alternative basis for justifying facially discriminatory policies which could not be considered BFOQs would render the BFOQ provision meaningless. There would be no reason for an employer to bother with the strict standards of the BFOQ defense if it could parry a challenge to an explicit age-based policy by showing simply that the policy was in some way "reasonable."

Other courts of appeals that have considered petitioner's proposed interpretation have rejected it. See *EEOC* v. *Massachusetts*, 987 F.2d 64, 72 (1st Cir. 1993) (employer could not maintain "reasonable factor

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regarding * * * [any] term, condition or privilege of employment" (29 C.F.R. 860.103(c) (1969)) and that defense should be "construed narrowly" (29 C.F.R. 860.103(e) (1969)).

other than age" defense where age was the only factor for requiring medical examinations of workers, even though employer asserted that "fitness" and not age was behind its decision to require such examinations); *EEOC* v. *City of Altoona*, 723 F.2d 4, 6 (3d Cir. 1983) (distinction based on pension eligibility which, in turn, depended on being age 65 or older, is based on age and so cannot be "reasonable factor other than age" under Section 4(f)(1)), cert. denied, 467 U.S. 1204 (1984); *EEOC* v. *County of Allegheny*, 705 F.2d 679, 682 (3d Cir. 1983) ("plain language" of Section 4(f)(1) precludes argument that state statute barring persons over 35 from sitting for police examination was based on reasonable factor other than age); *EEOC* v. *Home Ins. Co.*, 672 F.2d 252, 260 n.11 (2d Cir. 1982) (employer's act of retiring employee because he had reached a certain age was not "an action based on a factor 'other than age'").

b. Contrary to petitioner's contention (Pet. 27), the court of appeals properly relied on this Court's decision in *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). *Manhart* involved a class action brought on behalf of female employees alleging that their employer discriminated against them on the basis of sex regarding its pension plan, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[12] The employer argued

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[12] Petitioner contends (Pet. 27) that *Manhart* is not relevant here because Title VII does not contain a provision equivalent to the ADEA's "reasonable factor other than age" defense. For claims of sex discrimination in compensation, however, Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), incorporates by reference the defenses to claims under the Equal Pay Act of 1963, 29 U.S.C. 206(d), including the defense that a challenged pay differential was based on "any other

that its pension plan requiring larger contributions from female employees than from male employees did not violate Title VII because the plan was based on actuarial tables that reflected the disparity in average life expectancy of women and men, which, the employer contended, was a "factor other than sex." 435 U.S. at 704-706. This Court rejected that argument, declaring that "one cannot 'say that an actuarial distinction based entirely on sex is "based on any other factor other than sex." Sex is exactly what it is based on.'" *Id.* at 712-713 (quoting court of appeals). Similarly, the court of appeals in the instant case correctly concluded that petitioner could not say that its policy of forcing the retirement of people because of their age is based on any factor other than age.[13]

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factor other than sex." In light of the similar language in the two provisions, the court of appeals properly found the reasoning in *Manhart* equally applicable to the ADEA.

[13] Moreover, petitioner's indication that it abandoned the practice at issue here (see note 1, *supra*) together with its failure to identify other employers currently engaging in similar practices (and none have come to our attention), suggests that this case is of little practical importance for the future. Because money damages and injunctive relief to ensure future compliance remain at issue, however, we agree with petitioner that the case is not moot.

Finally, even if petitioner were correct in arguing that its directors were not employees within the meaning of the ADEA, petitioner's mandatory retirement policy may well have violated the ADEA because of its effect on employees who want to become directors. The ADEA prohibits age discrimination in the provision of any benefit, such as a directorship, that is "part and parcel of the employment relationship." *Hishon* v. *King & Spalding*, 467 U.S. 69, 75 (1984) (holding that Title VII prohibits a law partnership from discriminating against employees on the basis of sex in making decision whether employees would become partners in the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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firm). The prohibition applies even if granting the benefit of directorship would "entail[] a change in status from an 'employee' to an 'employer.'" *Id.* at 76. Yet, petitioner's "retirement policy prevents any employee over the age of 62 from ever being considered for a directorship." Pet. App. 14a.